

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

LESLIE J. SHAW,

Plaintiff,

v.

CITIMORTGAGE, INC.; *et al.*,

Defendants.

3:13-CV-0445-LRH-VPC

ORDER

Before the court is defendants CitiMortgage, Inc. (“CitiMortgage”) and Bank of New York Mellon’s (“BNY”) motion to dismiss plaintiff Leslie J. Shaw’s (“Shaw”) second amended complaint (Doc. #109¹). Doc. #113. Plaintiff Shaw filed an opposition (Doc. #117) to which moving defendants replied (Doc. #119).

I. Facts and Procedural History

This is a wrongful foreclosure and breach of contract action brought by Shaw against defendants. In 2003, Shaw obtained a residential loan from non-party Lehman Brothers Bank (“Lehman Brothers”) for a property located in Zephyr Cove, Nevada. The loan was secured by a promissory note and deed of trust in favor of Lehman Brothers. Shortly thereafter, the loan was transferred from Lehman Brothers to defendant the Bank of New York in its trust capacity. At that time, defendant NTS was listed as the trustee under the deed of trust.

¹ Refers to the court’s docket entry number.

1 Shaw initially made the requisite mortgage payments to non-party Aurora Loan Services
2 (who acted as loan servicer until June 2005) and then to defendant CitiMortgage, Inc.
3 (“CitiMortgage”) until 2011. In May 2011, Shaw and CitiMortgage allegedly entered into a loan
4 modification agreement that reduced the monthly mortgage payments for the property. In July
5 2011, CitiMortgage allegedly repudiated the agreement and forwarded Shaw a new modification
6 agreement. Shaw refused this new agreement and CitiMortgage allegedly resolved Shaw’s
7 mortgage account and re-booked his payments under the original May 2011 modification
8 agreement. In December 2011, CitiMortgage again allegedly repudiated the May 2011 loan
9 modification agreement. Thereafter, Shaw refused to make any loan payments and CitiMortgage
10 initiated non-judicial foreclosure proceedings on the property.

11 Subsequently, on July 26, 2013, Shaw filed a complaint against defendants for wrongful
12 foreclosure. Doc. #1, Exhibit 1. Shaw filed an amended complaint (Doc. #52) and then a second
13 amended complaint (Doc. #109). In his second amended complaint Shaw alleges eight (8) causes of
14 action against defendants: (1) declaratory relief against defendant Bank of New York;
15 (2) declaratory relief against defendant CitiMortgage; (3) breach of contract; (4) breach of the
16 covenants of good faith and fair dealing; (5) fraudulent misrepresentation; (6) negligent
17 misrepresentation; (7) interference with prospective economic advantage; and (8) violation of the
18 Real Estate Settlement Procedures Act. Doc. #109. Thereafter, defendants BNY and CitiMortgage
19 filed the present motion to dismiss Shaw’s second amended complaint. Doc. #113.

20 **II. Legal Standard**

21 Defendants seeks dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure
22 to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state
23 a claim, a complaint must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading
24 standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That
25 is, a complaint must contain “a short and plain statement of the claim showing that the pleader is
26 entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Rule 8(a)(2) pleading standard does not require

1 detailed factual allegations; however, a pleading that offers “‘labels and conclusions’ or ‘a
2 formulaic recitation of the elements of a cause of action’” will not suffice. *Ashcroft v. Iqbal*, 129 S.
3 Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

4 Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual matter,
5 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 1949 (quoting
6 *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows
7 the court to draw the reasonable inference, based on the court’s judicial experience and common
8 sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. “The plausibility
9 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a
10 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a
11 defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to
12 relief.” *Id.* at 1949 (internal quotation marks and citation omitted).

13 In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as
14 true. *Id.* However, “bare assertions . . . amount[ing] to nothing more than a formulaic recitation of
15 the elements of a . . . claim . . . are not entitled to an assumption of truth.” *Moss v. U.S. Secret*
16 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951) (brackets in original)
17 (internal quotation marks omitted). The court discounts these allegations because “they do nothing
18 more than state a legal conclusion—even if that conclusion is cast in the form of a factual
19 allegation.” *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) “In sum, for a complaint to survive a motion to
20 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be
21 plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.*

22 **III. Discussion**

23 **A. Declaratory Relief as to Defendant BNY**

24 In his complaint, Shaw challenges the assignment and transfer of his initial mortgage note
25 and deed of trust from non-party Lehman Brothers to defendant BNY. However, this claim fails as
26 a matter of law because a borrower lacks standing to challenge the transfer of his loan pursuant to a

1 Pooling and Service Agreement (“PSA”). *See Wood v. Germann*, 331 P.3d 859, 861 (Nev. 2014)
 2 (holding that a homeowner, “who is neither a party to the PSA nor an intended third-party
 3 beneficiary, lacks standing to challenge the validity of the loan assignment.”). Because Shaw was
 4 not a party to the PSA, he lacks standing to challenge the assignment. Therefore, the court shall
 5 grant defendants’ motion as to this issue and dismiss BNY as a defendant.

6 **B. Declaratory Relief as to Defendant CitiMortgage**

7 In his complaint, Shaw seeks an order from the court declaring the initial May 2011 loan
 8 modification agreement a permanent and enforceable loan modification agreement. As the
 9 existence and validity of the loan agreement is squarely at issue in several of Shaw’s claims, the
 10 court finds that it is premature to determine which loan modification agreement, if any, is the valid
 11 and enforceable agreement. Therefore, the court shall not address this claim at this time.

12 **C. Breach of Contract and Breach of Implied Covenants**

13 To prevail on a breach of contract claim, a plaintiff must demonstrate: (1) the existence of a
 14 valid contract; (2) a breach by the defendant; and (3) damages resulting from defendant’s breach.
 15 *Saini v. Int’l Game Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006); *Brown v. Kinross Gold*
 16 *U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1240 (D. Nev. 2008).

17 Further, under Nevada law, “[e]very contract imposes upon each party a duty of good faith
 18 and fair dealing in its performance and execution.” *A.C. Shaw Constr. v. Washoe County*, 784 P.2d
 19 9, 9 (Nev. 1989) (quoting Restatement (Second) of Contracts § 205). To establish a claim for
 20 breach of the implied covenant of good faith and fair dealing, a plaintiff must show that: (1) the
 21 plaintiff and defendant were parties to a contract; (2) the defendant owed a duty of good faith and
 22 fair dealing to the plaintiff; (3) the defendant breached his duty by performing in a manner
 23 unfaithful to the purpose of the contract; and (4) the plaintiff’s justified expectations were denied.
 24 *See Perry v. Jordan*, 900 P.2d 335, 338 (Nev. 1995) (citing *Hilton Hotels Corp. v. Butch Lewis*
 25 *Prod. Inc.*, 808 P.2d 919, 922-23 (Nev. 1991).

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1 In their motion, defendants argue that Shaw has failed to prove the existence of an
2 enforceable loan modification agreement because there was no consideration by CitiMortgage for
3 the modification. However, CitiMortgage's argument is more appropriate for summary judgment
4 when the parties can submit evidence on the issue of consideration. At this time, it is sufficient that
5 Shaw alleges that he and CitiMortgage entered into a final and binding loan modification
6 agreement in May 2011 that permanently reduced his mortgage payments and that CitiMortgage
7 repeatedly repudiated that agreement. Based on the allegations in the second amended complaint,
8 the court finds that Shaw has asserted a valid and viable cause of action for breach of contract and
9 breach of the implied covenants of good faith and fair dealing. Therefore, the court shall deny
10 defendants' motion to dismiss these claims.

11 **D. Fraudulent and Negligent Misrepresentation**

12 "In alleging fraud or mistake, a party must state with particularity the circumstances
13 constituting fraud or mistake." FED. R. CIV. P. 9(b). In order to meet the heightened pleading
14 requirements a plaintiff must specify the time, place, and content of the misrepresentation as well
15 as the names of the parties involved. *See Swartz v. KPMG, LLP*, 476 F.3d 756, 764 (9th Cir. 2007),
16 *see also, Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 n.10 (9th Cir. 1999); *Parnes v. Gateway*
17 *2000*, 122 F.3d 539, 549-50 (8th Cir. 1997) (requiring a plaintiff to allege the requisite who, what,
18 where, when, and how of the misrepresentation).

19 In their motion to dismiss, defendants argue that Shaw has failed to allege either of his fraud
20 claims with sufficient particularity to meet the heightened pleading standard of Rule 9(b). The court
21 agrees. In his complaint, Shaw makes general allegations about various representations
22 CitiMortgage made about reinstating the original May 2011 loan modification agreement.
23 However, Shaw fails to plead these misrepresentations with particularity. In his second amended
24 complaint, Shaw only generally alleges the time and place of CitiMortgage's misrepresentations.
25 Further, Shaw only generally alleges the content of the misrepresentations which is insufficient
26 under Rule 9(b). Therefore, the court finds that Shaw fails to plead these claims with the requisite

1 particularity and shall grant defendants' motion accordingly.

2 **E. Interference with Prospective Economic Advantage**

3 Shaw's claim for intentional interference with prospective economic advantage relates
4 solely to CitiMortgage's alleged failure to negotiate and approve a short sale of Shaw's property.

5 Generally, a loan servicer like CitiMortgage has no duty to approve a short sale. *See*
6 *Blanford v. Suntrust Mortgage, Inc.*, 2012 U.S. Dist. LEXIS 141666, *11 (D. Nev. 2012).

7 However, in this action Shaw alleges that CitiMortgage specifically requested that Shaw put his
8 home on the market as a short sale and directly forward any offer to CitiMortgage's counsel, only
9 to ignore the offers Shaw received and forwarded to counsel. Thus, in contrast to the *Blanford* case,
10 Shaw has alleged that CitiMortgage created a duty to consider and respond to short sale offers by
11 affirmatively requesting that Shaw list the house as a short sale. Therefore, the court shall deny
12 defendants' motion as to this claim.

13 **F. Real Estate Settlement Procedures Act**

14 In his last cause of action, Shaw alleges that CitiMortgage violated the Real Estate
15 Settlement Procedures Act ("RESPA") when it failed to provide Shaw with certain contact
16 information about his residential home loan lender upon receiving a qualified written request. *See*
17 12 U.S.C. § 2605(k)(1)(D) (entitling homeowners, upon submission of a qualified written request,
18 to the contact information for an owner or assignee of a mortgage loan for residential property. 12
19 U.S.C. § 2605(k)(1)(D).

20 In his second amended complaint, Shaw alleges that he sent a letter to the address provided
21 to him on the notice of default and election to sell, and that in response to his letter, CitiMortgage
22 advised him that it would treat his letter as a qualified written request under RESPA. Shaw alleges,
23 however, that he did not receive any information regarding the identity of, or contract information
24 for, the lender in response to his letter.

25 In its motion to dismiss, CitiMortgage argues that because Shaw wishes to negotiate a loan
26 modification on his non-performing loan, the relevant contact information is necessarily that of

1 CitiMortgage. However, whether Shaw had the requisite information is an issue of fact not properly
2 addressed in a motion to dismiss. Therefore, the court finds that Shaw has sufficiently alleged a
3 claim for violation of RESPA and the court shall deny defendants' motion accordingly.

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5 IT IS THEREFORE ORDERED that defendants' motion to dismiss (Doc. #113) is
6 GRANTED in-part and DENIED in-part in accordance with this order.

7 IT IS FURTHER ORDERED that defendant Bank of New York Mellon is DISMISSED as
8 a defendant in this action.

9 IT IS FURTHER ORDERED that plaintiff's fifth cause of action for fraudulent
10 misrepresentation and sixth cause of action for negligent misrepresentation are DISMISSED from
11 plaintiff's second amended complaint (Doc. #109).

12 IT IS SO ORDERED.

13 DATED this 4th day of February, 2015.

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16 LARRY R. HICKS
17 UNITED STATES DISTRICT JUDGE
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